contract so as to legitimate prior offspring *ab origine*. At birth the state of the father's domicile confers upon his natural child, not legitimacy, but the capacity to become legitimate,[8] — and this irrespective of the situs of birth.[9] This capacity is never lost. The state of the father's domicile at his marriage, if under the civil law, thereby ripens it into legitimacy from the beginning,[8] — again irrespective of the situs of the ceremony.[9] This is not the ordinary fiction of relation. The law opens its eyes wide to the facts, but allows a subsequent act to change their intermediate legal aspect. For legitimation *ab præsenti*, on the other hand, concurrence of two laws is not essential. The proper state may at any time by sovereign fiat confer legitimacy henceforth. This has been done by special legislative act[10] or by general statute conditioned on such act of the parents as public acknowledgment or *de facto* adoption. Confusion arises from American statutes legitimating by subsequent marriage. If designed to follow the civil law and legitimate only *ab origine*, capacity would seem essential;[11] if designed to operate *ab præsenti*, non-essential. The latter has been the prevailing American view.[12] Serious international difficulty arises when parent and child have separate domiciles and either state seeks to legitimate *ab præsenti*. This is undoubtedly letting one state confer status on the subject of another, for legitimate fatherhood and illegitimate childhood co-existing is unthinkable. It is true that one state alone may divorce; but jurisdiction to dissolve status does not argue jurisdiction to create. Adoption in such case would seem impossible.[13] Yet legitimacy differs from adoption and from other statuses in presupposing a natural relation, and this would seem enough to give either state power to confer it.[14] Whether the other state recognized this status to the detriment of its subject would be a local question for it to decide.[15]

LIABILITY OF STOCKHOLDERS ON UNPAID STOCK SUBSCRIPTIONS. — Two theories have been advanced to account for the liability of a stockholder, who has received stock from the corporation at less than par, to make up the difference when called upon to do so by the creditors of the corporation. The "trust fund" theory, first advanced by Judge Story in 1824,[1] regarded the capital stock of a corporation as a trust fund for the creditors, to be protected as such. So, though the stockholder be released by the corporation from the liability to pay full par value, he is yet required to do so when called on by its creditors.[2] This theory has been justly criticised.[3] While

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[8] *In re* Grove, 40 Ch. D. 216. See Dicey, Conf. of Laws, 497. Continental views are inharmonious. See Brocher, Droit Int. Privé, 153.

[9] Udny *v.* Udny, L. R. 1 H. L. Sc. 441.

[10] Scott *v.* Key, 11 La. Ann. 232. No English court has yet been called upon to recognize legitimacy *ab præsenti*.

[11] Smith *v.* Kelly's Heirs, 23 Miss. 167; Fowler *v.* Fowler, 131 N. C. 169.

[12] Adams *v.* Adams, 154 Mass. 290; Caballero's Succession, *supra*.

[13] Foster *v.* Waterman, 124 Mass. 592.

[14] Blythe *v.* Ayres, 96 Cal. 532. But see Minor, Conf. of Laws, 215; 65 L. R. A. 183, n.

[15] Irving *v.* Ford, 183 Mass. 448.

[1] Wood *v.* Dummer, 3 Mason (U. S. C. C.) 308.

[2] Scovill *v.* Thayer, 105 U. S. 143.

[3] O'Bear Jewelry Co. *v.* Volfer & Co., 106 Ala. 205. See Hollins *v.* Brierfield Coal and Iron Co., 150 U. S. 371, 381.

solvent, the corporation has the entire interest, legal and beneficial, in all its property, of which the capital forms a part; and when it becomes insolvent, in the absence of a statute to the contrary, it may prefer any of its creditors.[4] This is entirely inconsistent with the fundamental idea of a trust, which would require the corporation to deal with its legal title strictly for the benefit of all its creditors. And when, by a contract binding between the corporation and the stockholder, the latter is under no obligation to the corporation itself to make up the difference between what he paid for his stock and its par value, it is difficult to see where there is any *res* that is held in trust.

The other theory, which of late years has been rapidly supplanting the "trust fund" doctrine, bases the stockholder's liability on the ground of fraud, in the nature of deceit, for participating in the issue of stock purporting to be fully paid up, when in fact it is not. Persons who give credit to a corporation are presumed to rely on its stated capital as security for repayment. Therefore all who hold that capital out as fully paid up should be held to their representation.[5] This theory readily explains why those who become creditors without notice subsequently to the issue of stock below par can collect[6] the difference between the par value and what was paid, even though the stockholder is released by contract from any such obligation to the corporation itself, while those with notice[7] and prior creditors[8] cannot. This theory, too, may explain that series of cases which holds that a corporation, when embarrassed, for the purpose of carrying on its business may pay its debts or buy property with its stock at whatever the stock will bring without subjecting the taker to any further liability thereon even to creditors.[9] The policy of allowing such a transaction under such circumstances outweighs the equity of the creditor who has relied on the stated capital.

The inquiry yet remains how far the situation at common law has been changed by statute. Under the common constitutional or statutory provision, that stock shall be issued only for money, labor, or property actually received, and that all fictitious increase of stock shall be void, the question seems to be whether the stock is fully paid or not. If this is decided in the negative, all the common law doctrines as to rights of creditors attach.[10] A second class of statutes directs that each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid[11] upon the stock held by him. Some courts hold that this statute is but declaratory of the common law,[12] while others say that it imposes on the stockholder a liability to the creditor irrespective of when he became such or of his knowledge.[13] A stricter form of this class of statutes requires the

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[4] McDonald *v.* Williams, 174 U. S. 397. See Nappanee Canning Co. *v.* Reid Murdock & Co., 60 N. E. Rep. 1068 (Ind., Ct. App.).

[5] Hospes *v.* N. W. Mfg. & Car Co., 48 Minn. 174.

[6] Camden *v.* Stuart, 144 U. S. 104; Martin *v.* South Salem Land Co., 94 Va. 28.

[7] Coit *v.* Gold Amalgamating Co., 119 U. S. 343; Adamant Mfg. Co. *v.* Wallace, 16 Wash. 614.

[8] Flinn *v.* Bagley, 7 Fed. Rep. 785.

[9] Handley *v.* Stutz, 139 U. S. 417.

[10] Van Cleve *v.* Berkey, 143 Mo. 109.

[11] As to whether anything remains unpaid where the stockholder gives substantial consideration in the nature of property or labor in good faith, see 19 HARV. L. REV. 366.

[12] First Nat'l Bank of Deadwood *v.* Guston-Minerva, etc., Co., 42 Minn. 327.

[13] Sprague *v.* Nat'l Bank of America, 172 Ill. 149.

stockholder to make up the difference between what he paid for his stock and its par value. Under such a statute New Jersey has recently enforced liability in favor of a subsequent creditor with notice, notwithstanding that the stockholder had been released by the corporation from such liability and that the creditor had, as stockholder himself, assented to such release. *Easton Nat'l Bank* v. *American Brick and Tile Co.*, 64 Atl. Rep. 917 (Ct. Err. and App.). A very similar statute in Iowa, under similar circumstances, has received a contrary construction.[14] The interpretation of the New Jersey court, however, seems best to accord with the policy against watered stock at which these statutes are aimed.

THE EFFECT OF FRAUD AND THE STATUTE OF FRAUDS ON PAROL DECLARATIONS OF TRUST. — We may first consider several situations where B, the person attempted to be made a trustee, is not fraudulent. First, when A conveys land absolutely to B, who orally agrees to hold it in trust for A, it is clear that the statute renders the express trust unenforcible. But since B is under a duty in conscience which he refuses to perform, equity should compel him to return the consideration he received therefor, — *i. e.*, enforce specific restitution. The constructive trust thus raised for A would be by operation of law, and so within the exception of the statute. Such is the law in England.[1] But the American courts, insisting rather blindly that such a trust is in the teeth of the statute, refuse to raise it.[2] They prevent total injustice, however, by permitting A to recover the value of the land.[3] Secondly, when A conveys land absolutely to B, who orally agrees to hold it in trust for C, the American courts, again differing from the English, allow B to keep the land, insisting with still less justification that they would otherwise be nullifying the statute.[4] B, conscionably, has no right to the land, and so a constructive trust should be raised for A, as in cases where an intended trust fails for other reasons.[5] Thirdly, when A devises land absolutely to B, or agrees to remain intestate when B is his heir-at-law, with the parol understanding that B is to hold for C, it is the settled law, anomalous for England and doubly anomalous for America, that C may enforce the trust.[6] Logically, the English doctrine in the preceding situations should be applied here also, with the result of raising a constructive trust for A's heirs, as when testamentary trusts fail for other reasons.[7] The decision of the courts may be viewed as a specific enforcement of the agreement, with the statutory objection overcome by the strong equitable consideration that, as the testator is dead, in no other way could his wish to do something for C ever be carried out.[8] Fourthly, if A execute to B, his heir apparent, what they both believe to be a valid conveyance, with the parol agreement that

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[14] Callanan *v.* Windsor, 78 Ia. 193; State Trust Co. *v.* Turner, 111 Ia. 664.

[1] Booth *v.* Turle, L. R. 16 Eq. 182.

[2] Hubbard *v.* Sharp, 11 N. Y. St. Rep. 802.

[3] Cromwell *v.* Norton, 79 N. E. Rep. 433 (Mass.).

[4] Peterson *v.* Boswell, 137 Ind. 211. *Contra*, McKinney *v.* Burns, 31 Ga. 295. See 3 Pomeroy, Eq. Jurisp., § 1056 (3).

[5] St. Paul's Church *v.* Attorney-General, 164 Mass. 188.

[6] Russell *v.* Jackson, 10 Hare 204; Will of O'Hara, 95 N. Y. 403, 413. *Contra*, Moore *v.* Campbell, 102 Ala. 445; Bedilian *v.* Seaton, 3 Wall. Jr. (U. S. C. C.) 279, 285.

[7] Will of O'Hara, *supra*.

[8] See Bedilian *v.* Seaton, *supra*, 286.